

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WARREN F. WILSON,
appellant,
v.
DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
agency.

DOCKET NUMBER
AT075281F0916ADD
DATE: 1 6 AUG 1984

OPINION AND ORDER

Appellant was removed from his position as Air Traffic Control Specialist on charges of striking against the Federal government and unauthorized absence from August 3-10, 1981. On appeal to the Board's Atlanta Regional Office, appellant's removal was reversed. In an addendum decision of October 13, 1983, the Board's presiding official designated to adjudicate this matter awarded appellant the full amount of his requested attorney fees, totaling \$11,850.00. The agency's petition for review of that addendum decision is hereby GRANTED pursuant to 5 U.S.C. § 7701(e)(1).

In its petition for review, the agency challenges only the reasonableness of the amount of the fees awarded,¹ arguing that it was not possible for the presiding

1/ The agency's petition focuses solely on the claimed number of hours expended on the appellant's case, and not on the hourly rate charged by the appellant's counsel, which the presiding official found to be reasonable and customary under the circumstances.

official to discharge his statutory responsibility to scrutinize with due care the motion for fees based upon the material submitted to him in support of that request.

Appellant's motion for fees contained an affidavit from his attorney listing nine services performed by him on the appellant's behalf and the number of hours attributable to each. However, the appellant's counsel also conceded that:

[t]here were no specific time records maintained on the case. The foregoing hourly computations were arrived at by a complete review and analysis of the file including pleadings, copies of outgoing and incoming correspondence, notations taken during office conferences, exhibits, notations taken during telephone conversations, and other records. The amount of time spent at the Final Hearing is of course substantiated by the presiding official's recollection.

In its response to the motion, the agency claimed that this documentation was insufficient to support the claim. It also argued that the appellant's attorney failed to provide any specific information regarding the fee arrangement between them, which is normally presumed to represent the maximum reasonable fee which may be awarded. See O'Donnell v. Department of Interior, 2 MSPB 604, 611-612 (1980). However, the presiding official granted the fee award requested based on those reconstructed time records, his own familiarity with the case, the attorney's experience and performance, and the affidavits of two other attorneys, from the same geographical location and with experience in the same fields, who reviewed those records and the case file and found the fee request reasonable under the circumstances.

We agree. It is well settled that "[w]hile it is by far the better practice for attorneys to keep time sheets, such documentation is not always essential." Harkless v. Sweeny Independent School District, 608 F.2d 594 at 597 (1979). The absence of contemporaneous time records is

normally an insufficient basis, by itself, upon which to deny a fee award altogether, although it may prompt a reviewing court to scrutinize reconstructed records with care and to reduce the hours claimed if there is uncertainty as to their accuracy. International Travel Arrangers, Inc. v. Western Airlines, 623 F.2d 1255 at 1275-6 (1980), cert. den., 101 S.Ct. 787 (1980); Nero v. Levine, 75 Civ. 1024 (S.D. N.Y. 1980), Federal Attorney Fees Awards Reporter, Vol. 3, No. 5, page 21 (August 1980) (Harcourt Brace Jovanovich, Publishers).

While mere estimates of time have been deemed unacceptable, substantially reconstructed and reasonably accurate time records, made, as in this case, only after careful review of correspondence, pleadings, briefs and other papers on file, have been entertained and found sufficient to support an award of fees.^{2/} Bolden v. Pennsylvania

^{2/} This is especially true, where, as here, the payment plan originally contemplated between the appellant and his counsel was a contingency fee arrangement, pursuant to which attorneys typically do not maintain detailed time records. See Donnarumma v. Barracuda Tanker Corp., 79 F.R.D. 455, 465 (C.D. Cal. 1978). In his response to the agency's petition, the appellant's counsel explains that because adherence to this original contingency agreement would have resulted in the appellant's debt to his attorney of approximately \$29,000 (one-third of the gross back pay, received as a result of his successful appeal, and substantially more than his net back wages), an attempt was made to arrive at a more affordable total by reconstructing the actual time spent at his customary hourly rate. Contrary to the agency's implication, at the time the appellant's motion for attorney fees was made, there was no requirement that evidence of a specific fee agreement be produced in a motion for attorney fees -- although it of course would have been helpful -- and we reject its argument that the presiding official erred by not mandating such evidence. We have since held that submission of such an agreement, or a statement of its terms, will be required with future fee motions. However, that requirement is prospective from the date of that holding, in our decision in Gerlach v. Federal Trade Commission, MSPB Docket No. DC0752801002 ADD at 7 (March 19, 1984).

State Police, 491 F.Supp. 958, 963 (E.D. Pa. 1980), citing Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 382 F.Supp. 999 (E.D. Pa. 1974), remanded on other grounds, 540 F.2d 102 (3rd Cir. 1976). Despite the fact that counsel's itemized list of services rendered does not specify a date for each, we believe that, under the circumstances, it was sufficiently detailed to enable the presiding official to evaluate what was claimed, especially in light of his own knowledge of the proceedings of the case. See Dennis v. Chang, 611 F.2d 1302, 1308 (1980). Finally, the presiding official's conclusion of the amount of time spent in a case in which detailed time records are not available is entitled to deference, and will not be overturned, absent an abuse of discretion. Harkless, supra, at 597, citing Davis v. Board of School Commissioners of Mobile County, 526 F.2d 865 (5th Cir. 1976).

Accordingly, the presiding official's addendum decision is hereby AFFIRMED and the agency is hereby ORDERED to reimburse the appellant's counsel directly in the amount of \$11,850.00.^{3/} Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the Atlanta Regional Office in accordance with 5 C.F.R. § 1201.181(a).


This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(c).

^{3/} The appellant's Motion to Dismiss Respondent's Petition for Review and to Enforce Final Decision, dated January 24, 1984, is hereby DENIED. The agency's petition was dated November 16, 1983, and received by the Board on November 18, 1983. A petition for review is deemed timely filed when it is mailed on the day the addendum decision is to become final (here, November 17, 1983). Beer v. Department of the Army, 2 MSPB 226 (1980). Because the agency's petition was timely filed, the appellant's request for interest on the attorney fee award is similarly denied.

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Washington, D.C.



PAULA A. LATSHAW
ACTING SECRETARY